

Helping Clients Avoid Surprises in Long Term Care

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Overview

- Liability of persons signing admissions contracts on behalf of residents
- Liability arising by statute for family members including spouses and adult children
- Various other “surprises”



The Importance of Contracts

- Federal Law limits Medicare/Medicaid qualified facilities in contracting with family members
 - Prohibits mandatory- third party guarantees of payment
 - Permits “voluntary” third-party guarantees of payment
 - Prohibits waivers or promises not to apply for Medicaid
 - Exception: CCRCs are permitted to require all declared resources to be used for care at facility before Medicaid application

Who Signs Admission Contracts?

- The law provides that every “resident may be permitted to name a responsible person.” 28 Pa. Code Section 201.24(A)
- But, the “resident is not required to name a responsible person if the resident is capable of managing the resident's own affairs.” Id.
- Does signing party have actual or apparent authority to sign on behalf of resident?
 - Power of Attorney?
 - Guardian?
 - “Responsible Party” or similar labels – ??????

What is a “Responsible Party?”

- Undefined term under federal law
- Usual interpretation: same as “agent,” acting on behalf of the Resident/Principal
- No personal liability to Facility arising out of agency status alone. . . but
- Case law and/or contract may impose additional obligations for Responsible Party running to the facility

Responsible Party Cases

- Care Center of Kansas City v. Horton, 173 S.W. 3d 353 (Mo. Ct. App. 2005) – held contract signed by family member as “responsible party” was unambiguous – family member liable
- Northfield Care Center Inc. v. Anderson, 707 N.W. 2d 731 (Minn. Ct. App. 2006) – distinguished b/n liability for failure to make proper/complete application for MA and role as “responsible party”



Lessons from Recent Cases

- ❑ Anyone signing long-term care contract should recognize importance of payment sources, Medicaid application process, and when in doubt, seek assistance of counsel
- ❑ When possible, sign only as “Jane Doe as Agent for Resident” or similar qualification
- ❑ When possible, strike “Responsible Party” designation as confusing
- ❑ If facility is handling application, keep track of progress

Statutory Alternatives to Contract Liability

- Spousal Necessities Doctrine under 23 Pa. C.S.A. Section 4102:

“In all cases where **debts are contracted for necessities** by either spouse for the support and maintenance of the family, **it shall be lawful for the creditor... to institute suit** against the husband and wife for the price of such necessities....

Statutory Sources (cont.)

- Filial Responsibility under 23 Pa. C.S.A. 4601-4606:

“[A]ll of the following individuals have the responsibility to care for and maintain or financially assist an indigent person, regardless of whether indigent person is a public charge:

Spouse... child... [and] parent of indigent person”

How do statutory claims arise?

- Example: Recent complaint (2007 WL 606047) alleges:
 1. Older parent admitted to nursing home in PA
 2. Medicaid application submitted and denied [for failure to provide CAO with documents necessary to determine eligibility] – alleges Son “refused to cooperate”
 3. Alleges Son [in California] has statutory duty to support mother under Section 4603 so liable for cost of care



History of Filial Support Laws

- 62 P.S. 1973
- July 7, 2005 – Pennsylvania Legislature’s actions:
 - Amended Pennsylvania’s Medicaid Laws, tightening eligibility – Act 42
 - Act 43 - Moved Section 1973 from Welfare Code to Domestic Relations Code’s Support Laws

Defenses and Limitations to Filial Law

- ❑ No liability if “individual does not have sufficient financial ability to support indigent person”
- ❑ No liability “for support of parent who abandoned child. . . or period of 10 years during child’s minority”
- ❑ Maximum: for medical assistance for aged other than public nursing home care: lesser of 6 times the excess of individual’s average monthly income over amount of reasonable support for individual and other dependents

Most Recent Appellate Case:

- Presbyterian Hospital Center v. Budd, 832 A.2d 1066 (Pa. Super. 2003): Remanding nursing home's case for further proceedings against daughter under Section 1973 where daughter used POA to transfer mother's funds to self prior to death and did not pay nursing home. Recognized daughter's liability under support law as alternative to proof necessary for fraud claim.



Future Issues for Family/Agents

- 23 Pa. C.S.A. 4603 does not distinguish between “good” and “bad” children – or out-of-state children
- Will reluctant child keep parent at home too long to avoid potential personal financial liability?
- Does good faith reliance on contractual limitations on liability trump statutory liability?
- Will facilities other than nursing homes turn to family members for guarantees or statutory liability?

Other Possible Surprises?

“Mandatory” Arbitration Clauses

- ❑ Facilities now frequently attempt to obtain agreement to mandatory arbitration during the admission process
- ❑ Federal and state law strongly support enforcement of arbitration agreements – but agreements forced on to consumers may be different than sophisticated commercial parties agreeing to arbitrate
- ❑ Pre-dispute mandatory arbitration agreements are controversial, even among pro-ADR groups

Sample Language demonstrating scope:

- “Resident shall settle any and all previously unasserted claims, disputes, or controversies arising out of or related to this Agreement and Resident residence or cessation of Resident’s residency at Retirement Community **exclusively by final and binding arbitration before a neutral arbitrator.** By way of example only, such claims include claims under federal, state and local statutory or common law, including but not limited to the Americans With Disabilities Act, the law of contract and the law of tort.”

Research on Pre-Dispute Arbitration Clauses

- Empirical research demonstrates primary purpose and effect of clauses are facilities' goal to limit number and scope of claims, rather than because of any "fairness" in arbitration process.

- Case law reveals challenges to mandatory pre-dispute arbitration clauses, including several key issues raised:
 - Cannot bind non-parties
 - Unavailability of arbitral organization
 - Waiver by conduct of facility post-claim
 - Terms are "unconscionable" – hard to prove

Was Agreement to Arbitrate a Condition of Admission?

- Empirical research: No contract language expressly tied admission to agreement to arbitrate
- But, “take it or leave it” presentation of agreement by staff
- 28 of 30 agreements did not specify whether declining/rejecting/striking arbitration provision was permitted
- Podolsky v. First Healthcare Corp., 58 Cal. Rpt. 2d 89 (Ct. App. 1996) (Describing admissions practices in violation of federal nursing home law – such as requiring private payment promises – demonstrates importance of marketing practices).
- Should signing parties resist signing pre-dispute arbitration agreements? They can almost always agree to arbitrate if they desire that forum after dispute arises.

Recent interesting Pennsylvania case:

Waiver by Facility

Bruno v. Beverly Healthcare, 2005 WL 4876442 (Pa. Common Pleas Ct. 2005), reversed at 989 A.2d 1123 (Pa. Super. 2006) – unpublished opinion, declining to address unconscionability, but remanding for trial, finding facility waived right to arbitrate by using court process for discovery before filing motion to compel arbitration

Selected Arbitration Resources

- ❑ AHLA Seminar Papers, e.g., “Long Term Care and the Law” (Feb. 6. 2006) available on Westlaw at P02150630
- ❑ J. Sternlight, “Creeping Mandatory Arbitration: Is it Just?” 57 Stan. L. R. 1631 (April 2005)
- ❑ E. Stanley, “Parties’ Defenses to Binding Arbitration in Health Care,” 38 St. Mary’s L. J. 591 (2007)(theory of reverse preemption under McCarron-Ferguson Act)
- ❑ K. Palm, “Arbitration Clauses in Nursing Home Admission Agreements: Framing Debate,” 14 Elder Law J. 453 (No. 2, 2005).
- ❑ R. Hornstein, “Fiction of Freedom of Contract” 16 St. Thomas L. Rev. 319 (Winter 2003)
- ❑ A. Krasuski, “Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts,” 8 DePaul J. Health Care L. 263 (Fall 2004)
- ❑ For discussion by industry of standards of care, see www.nursinghomesmagazine.com
- ❑ “Arbitration Highway to the Courthouse,” 86 Am. Jur. Trials 111